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No. 84-9

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, and CELIA STEVENSON,
Petitioners,
v.
DORIS RUSSELL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE FOR AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE FOR AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION

The American Council of Life Insurance ("Council") and the Health Insurance Association of America ("HIAA") hereby move, pursuant to Rule 36.1 of the Rules of this Court, for leave to file the attached brief as amici curiae. Consent to the filing of this brief has been obtained from counsel for the Petitioners. Counsel for the Respondent has refused consent.

The Council is the largest life insurance trade association in the United States, representing the interests of 611 member life insurance companies including most of the major life insurers in the country. The Council's members currently hold more than ninety-five percent of the life insurance in force in legal reserve life insurance companies in the United States. Member companies also account for ninety-nine percent of the insured private pension plan business in the United States. The HIAA represents the interests of 327 member companies which write over eighty-five percent of the health insurance written by insurance companies in the United States, and the combined memberships of the HIAA and the Council represent over ninety percent of the health insurance written by insurance companies in the United States.

The life insurance and health insurance industries affect many individuals in our nation's work force. Over 60 million Americans in 1981 held some form of short-term disability income protection, and 21.6 million individuals were protected by long-term disability programs sponsored by insurance companies. *See* Source Book of Health Insurance Data 1982-83, Health Insurance Association of America. Moreover, during 1980, 500,000 private pension plans, 6,600 state and local government pension plans, and 38 federal workers retirement plans were in existence in the United States. *See* Ghysels, "The Role of Insurers in Group Pensions," Best's Review, Vol. 81, p. 20 (Dec. 1980). These plans represented more than $550 billion in assets. *Id.* More specifically, at the end of 1980, private pension plans administered by U.S. legal reserve life insurance companies provided coverage to 26.1 million Americans. *See* American Council of Life Insurance, 1982 Pension Facts. Assets backing those plans totaled $165.8 billion, an increase of 19 percent over the immediately preceding year. *Id.* By 1982, the number of Americans covered by private pension

plans administered by U.S. legal reserve life insurance companies had risen to 30.5 million, with assets totaling $228.9 billion. *Id.*

Many members of the Council and the HIAA provide benefits to their employees under plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* Because the Council and the HIAA have nationwide constituencies, they are peculiarly able to present to the Court the views of the life insurance and health insurance industries on the importance of this Court's review of the issue in this case: whether ERISA permits a plan beneficiary or participant to recover extra-contractual and punitive damages from a plan fiduciary for a breach of its statutory duties. The Council and the HIAA are genuinely concerned that the substantial confusion among the lower federal courts regarding the role of punitive damages in ERISA actions will result in a haphazard and inconsistent enforcement of ERISA's comprehensive statutory scheme on a nationwide basis.

Because of the Ninth Circuit's opinion in particular and the uncertainty in the law of punitive damages in general, members of the Council and the HIAA who voluntarily establish employee benefit plans are confronted with the possibility that the processing of a benefit claim will be accompanied by a substantial, yet wholly unpredictable, punitive award. The prospect of incurring substantial punitive damages awards for mishandling benefit claims will have a detrimental impact on the willingness and the ability of members of the Council and the HIAA to establish future, or increase contributions to, employee benefit plans.

For these reasons, the motion for leave to file the attached brief of amici curiae in support of the Petition should be granted.

Respectfully submitted,

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AUGUST, 1984

BRIEF FOR AMICI CURIAE

QUESTION PRESENTED

Whether the Employee Retirement Income Security Act permits an employee benefit plan participant or beneficiary to recover punitive damages or extra-contractual compensatory relief from a plan fiduciary for improper or untimely processing of benefit claims?

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BRIEF AMICI CURIAE FOR AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION

This brief is filed on behalf of the American Council of Life Insurance and the Health Insurance Association of America, as amici curiae, in support of the petition for certiorari.

INTERESTS OF THE AMICI

As indicated in the Motion accompanying this Brief, the American Council of Life Insurance ("Council") is the largest life insurance trade association in the United States, and the Health Insurance Association of America ("HIAA") represents the interests of 327 member companies which write over eighty-five percent of the health insurance written by insurance companies in the United

States. The combined memberships of the HIAA and the Council are responsible for more than ninety percent of the health insurance written by insurance companies in the United States.

The prospect of incurring substantial punitive damages awards for mishandling benefit claims—a prospect made a reality by the Ninth Circuit's opinion below—is a matter of grave concern to members of the Council and the HIAA. As with any form of insurance, a predictable allocation of risks and costs, based upon historical patterns of benefit payments, is essential to the financial integrity of these benefit plans. Because the opinion below creates the possibility that the processing of a benefit claim may be accompanied by a substantial, yet unpredictable, punitive award, the stability of the plans administered by members of the Council and the HIAA is seriously threatened. Members will be forced to incur the increased costs of defending actions seeking punitive relief and of making payment of unmeritorious claims to avoid such actions in the future. Faced with large and unpredictable punitive awards, employers may be unwilling, or unable, to increase contributions to employee benefit plans. Moreover, given the voluntary nature of such plans, employers may be discouraged from establishing new plans due to the increased liabilities associated with such plans. Because the decision of the Ninth Circuit portends serious adverse effects on the insurance industry and the benefit plans its members administer, the Council and the HIAA have a direct and immediate interest in the question presented in this case. In addition, members who provide benefits to their own employees have the same concern as any other employers offering employee welfare benefit plans to their employees.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 722 F.2d 482 (Pet. App. 1a-25a). The opinion of the United States District Court for the Central District of California is not reported. It is set forth at pp. 26a-30a in the Appendix to the Petition.

JURISDICTION

The judgment below was entered on December 16, 1983. A petition for rehearing and suggestion for rehearing en banc, filed by the petitioners, was denied on April 6, 1984 (Pet. App. 34a). The Petition for Certiorari was filed on July 5, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") provides, in pertinent part, that:

> (a) A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover his benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a) (1982).

Section 409(a) of ERISA provides, in relevant part, that:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109(a) (1982).

STATEMENT

Massachusetts Mutual Life Insurance Company ("Mutual") provides disability benefits to its employees under two plans: the Employee Salary Continuance Plan ("ESCP") and the Employee Disability Plan ("EDP"), both of which are funded by company assets. The ESCP provides benefits based upon a percentage of an employee's salary. The EDP provides disability benefits when all benefits under ESCP are exhausted, and when an employee is disabled for a minimum of eight weeks. Both plans are benefit plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA" or "Act"), 29 U.S.C. §§ 1001 *et seq.*

The respondent here, an employee of Mutual, took a leave of absence in May, 1979, due to a back ailment. Respondent submitted a claim for disability benefits, and Mutual began paying salary continuance benefits under its plan. Payment of these benefits, however, was terminated in October, 1979. The reason for the termination

was an orthopedic specialist's report that respondent was not physically disabled.

Respondent took an internal appeal of Mutual's decision to terminate her salary continuance benefits. Respondent also underwent an independent psychiatric examination, after which the examining physician concluded that respondent was temporarily disabled due to psychiatric illness. Based upon this information, Mutual in March, 1980, resumed paying her salary continuance benefits. All accrued salary continuance benefits owed to the respondent were paid by Mutual, and respondent continues to receive long-term disability benefits under Mutual's disability plan.

Respondent initiated this action in a California Superior Court to recover damages which she claims were caused by Mutual's alleged improper handling of her claim for disability benefits. In her complaint, respondent asserted various state law causes of action, including breach of the covenant of good faith and fair dealing under California law, breach of fiduciary duty, breach of her employment contract, and intentional and negligent infliction of emotional distress. Respondent sought both compensatory and punitive damages. Mutual removed the action to the United States District Court for the Central District of California on grounds that respondent's causes of action "related to" her benefits and were thus preempted by ERISA. *See* 29 U.S.C. § 1144.

The Proceedings Below

After removal to the district court, Mutual moved for summary judgment, which the district court granted in favor of Mutual as to all claims. The court found that ERISA preempted respondent's claims relating to plan benefits, including her claims for intentional and negli-

gent infliction of emotional distress and breach of fiduciary duties. In concluding that the respondent was entitled to neither compensatory nor punitive damages, the court ruled that extra-contractual damages arising out of a denial of benefit claims were not recoverable under ERISA.

On appeal, a panel of the Ninth Circuit agreed with the district court that ERISA preempted the state law causes of action based upon Mutual's alleged mishandling of respondent's disability claims. The court of appeals ruled, however, that the respondent had alleged a federal cause of action which was cognizable under ERISA. Specifically, the appellate court held that section 502(a)(2) and 409(a) of ERISA afford plan beneficiaries the right to bring an action against plan fiduciaries for a breach of their duties based upon an alleged improper handling of benefit claims. Emphasizing the remedial nature of the Act, the court ruled that Congress intended this federal cause of action to extend not only to conduct relating to the management of plan assets but also to the handling and processing of benefit claims.

Extrapolating from this implied federal cause of action, the court of appeals determined that ERISA permits plan beneficiaries to recover compensatory damages proximately caused by a breach of fiduciary duty and that such damages are not limited to the amount of any benefit loss. To support its holding that ERISA permits recovery of extra-contractual damages, the court of appeals cited section 409 as a broad provision giving courts "wide discretion" to award any appropriate equitable or remedial relief. *Russell v. Massachusetts Mutual Life Insurance Company*, 722 F.2d 482, 490 (9th Cir. 1983). On this basis, the court found extra-contractual damages to be appropriate relief under ERISA. Such relief, the court determined, was necessary to make aggrieved parties whole and to discourage fiduciaries from ignoring their duties under the Act.

Further expanding the relief available to parties pursuing this cause of action, the court of appeals held that punitive damages are also recoverable under ERISA. The court reiterated its conclusion that section 409 confers broad discretion upon courts fashioning appropriate relief and stated that Congress did not intend to exclude the imposition of sanctions against fiduciaries who fail to meet their duties. The court nevertheless added that an award of punitive damages would only be appropriate where the fiduciary acted with "actual malice or wanton indifference to the rights of a participant or beneficiary." *Id.* at 497.

REASONS FOR GRANTING THE WRIT

1. The Current Confusion among the Lower Federal Courts Concerning the Availability of Punitive Damages under ERISA Can Only Be Resolved by This Court.

This case presents a critical issue of federal law which has generated substantial confusion among the lower federal courts: whether the Employee Retirement Income Security Act permits a plan participant or beneficiary to recover punitive damages from a fiduciary for a breach of its duties under the Act. The court below concluded that ERISA does permit an award of punitive damages.[1] The Eighth Circuit, however, has voiced serious doubts

[1] The Ninth Circuit has twice held that punitive damages are recoverable under ERISA. In addition to the instant case, the Ninth Circuit held in *Winterrowd v. David Freedman and Company*, 724 F.2d 823 (9th Cir. 1984), that punitive damages are available in an action under ERISA for the willful failure of an employer to make pension fund contributions.

that ERISA contemplates such awards.[2] Moreover, the decisions of the federal district courts addressing this issue reflect a lack of unanimity and inconsistent reasoning concerning this important subject.[3]

Only this Court can effectively resolve the uncertainty among the lower federal courts as to the role, if any, that punitive damages play in the enforcement scheme of ERISA. Without guidance from this Court, the lower federal courts will be unable to enforce the civil liability provisions of ERISA in a consistent and predictable man-

[2] In *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 and 1084 (1981), the Eighth Circuit refused to uphold an award of punitive damages, totaling $150,000, in an action under ERISA arising from a termination of plan benefits and from an alleged interference with a benefit plan. In reversing the district court's award of punitive damages, the Court stated (653 F.2d at 1216):

> We do not think punitive damages are provided for in ERISA. Ordinarily punitive damages are not presumed; they are not the norm; and nowhere in ERISA are they mentioned. If Congress had desired to provide for punitive damages, it could have easily so stated, as it has in other acts. However, we need not decide this issue, because we find that punitive damages are inappropriate in this case under either 29 U.S.C. § 1132(a) or § 1140.

[3] Included among the cases refusing to permit awards of punitive damages in actions brought for ERISA violations are: *Zittrouer v. UARCO Incorporated Group Benefit Plan*, 582 F. Supp. 1471 (N.D. Ga. 1984); *Meyer v. Phillip Morris, Inc.*, 575 F. Supp. 1232 (E.D. Mo. 1983); *Hechenberger v. Western Electric Co.*, 570 F. Supp. 820 (E.D. Mo. 1983); *Whitaker v. Texaco*, 566 F. Supp. 745 (N.D. Ga. 1983); *Maxfield v. Central States*, 559 F. Supp. 158 (N.D. Ill. 1982); *Diano v. Central States*, 551 F. Supp. 861 (N.D. Ohio 1982); *Haskins v. Retirement Plan*, No. 78C3670 (N.D. Ill. 1982); *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357 (E.D. Mo. 1979); and *Hurn v. Retirement Fund Trust*, 424 F. Supp. 80 (C.D. Cal. 1976). Cases reaching a contrary result include: *Jiminez v. Pioneer Diecasters*, 549 F. Supp. 677 (C.D. Cal. 1982); *Free v. Gilbert Hodgman, Inc.*, 3 Empl. Ben. Cas. (BNA) 1010 (N.D. Ill. 1982); *Eaton v. D'Amato*, 581 F. Supp. 743 (D.D.C. 1980); and *Bittner v. Sadoff and Ruday Industries*, 490 F. Supp. 534 (E.D. Wisc. 1980).

ner; and fiduciaries who are governed by this comprehensive federal statute (many of whom operate in many states) will be confronted with the anomalous result of being subjected to punitive damages awards in one judicial district yet not in another. Moreover, in the districts permitting such awards, the vagueness of judicial tests and factors for determining whether, and in what amount, punitive damages should be awarded poses a substantial threat of haphazard and potentially excessive punitive damages awards. Such an inconsistent and unpredictable enforcement of this comprehensive statutory scheme can only thwart, rather than promote, the purposes and policies underlying the Act.

2. The Ninth Circuit's Determination that ERISA Permits a Beneficiary or Participant to Recover Punitive Damages and Extra-contractual Relief from a Plan Fiduciary Is Inconsistent with the Act's Express Language and with the Policies Embodied in the Act.

The Ninth Circuit misconstrued the statute when it endorsed the use of punitive and extra-contractual damages in ERISA enforcement actions, despite the conspicuous absence of statutory language permitting such awards. Moreover, the court of appeals misinterpreted the Act when it allowed such damages to be awarded to plaintiffs who pursue a cause of action which is not expressly provided for in the statute.[4]

[4] Section 502(a) of the Act accords the Secretary of Labor, plan participants, beneficiaries, and fiduciaries the right to bring a civil action for "appropriate relief" under section 409. *See* 29 U.S.C. § 1132(a)(2). Section 409 provides that plan fiduciaries may be held personally liable "to such plan," and may be "subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. § 1109(a). In accordance with the plain terms of the statute, therefore, fiduciary liability runs directly to the plan, and not to plan beneficiaries. Moreover, the type of "other" relief contemplated, *e.g.*, removal of a fiduciary, appears not to encompass awards of punitive and extra-contractual relief directly to plan beneficiaries.

This Court has hesitated to award punitive damages where clear congressional guidance is absent. *See International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979). In *Foust*, the Court addressed the question whether punitive damages could be assessed under the Railway Labor Act against a union for a breach of its duty of fair representation. The cause of action in *Foust* was judicially implied, and, accordingly, Congress had not specified the type of remedial relief available in fair representation suits. In the absence of clear congressional guidance, this Court refused to permit punitive damages to be awarded, noting that the benefits of increasing a union's willingness to pursue individual complaints due to the threat of punitive damages were offset by the possibility that punitive awards would upset the balance of individual and collective interests and could impair the financial stability of unions. Further, the court viewed punitive damages awards to be incompatible with the "essentially remedial" purpose of the Railway Labor Act. *Id.* at 52.

ERISA, like the Railway Labor Act, is essentially remedial in nature. Congress specifically provided a comprehensive enforcement scheme designed to protect employee rights and the integrity of employee benefit plans.[5] Nowhere in this scheme, however, did Congress mention or imply that punitive damages would be available to beneficiaries seeking relief under the statute.[6]

[5] In addition to the detailed remedies provided in ERISA's civil enforcement section, *see* 29 U.S.C. § 1132, the Act imposes criminal penalties, including imprisonment and fines up to $100,000, upon those who willfully violate ERISA's reporting and disclosure provisions. *See* 29 U.S.C. § 1131.

[6] Congress knows how to provide for punitive damages where it deems such relief to be appropriate. Congress has explicitly incorporated punitive damages provisions into various federal statutes. *See, e.g.*, Clayton Act § 4, 15 U.S.C. § 15 (1976) (treble damages); Consumer Credit Protection Act § 616, 15 U.S.C. § 1681(n) (1982) (punitive damages); Omnibus Crime Control and Safe Streets Act of 1968 § 802, 18 U.S.C. § 2520 (1982) (punitive damages); Civil Rights Act of 1968 § 812(c), 42 U.S.C. § 3612(c) (1976) (punitive damages).

Construing this silence to permit punitive damages to be assessed personally against a fiduciary also runs counter to the policies embodied in the Act. In enacting ERISA, Congress carefully weighed the rights and interests of plan beneficiaries against the interests of employers in administering effective and cost-efficient plans. Congress was "constrained to recognize the voluntary nature of private" plans and accordingly weighed "[t]he relative improvements required by this Act . . . against the additional burdens to be placed on the system." H.R. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639. Acknowledging congressional concern about the impact of increased costs upon the pension industry, Senator Nelson, during floor debate on the Conference Report, stated:

> In all its deliberations and decisions, Congress was acutely aware that under our voluntary pension system the cost of financing pension plans is an important factor in determining whether a pension plan will be adopted. Unduly large increases in cost can impede the progress of the private pension system. For this reason, . . . Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping costs within reasonable limits for employers.

Senate Comm. on Labor and Public Welfare, Senate Consideration of Conference Report to Accompany H.R. 2, *reprinted in* 3 Legislative History of the Employee Retirement Income Security Act of 1974, 4733 at 4800 (1976).

The Ninth Circuit's decision unsettles this delicate balance of costs and benefits. The decision exposes employers, who voluntarily establish employee benefit plans, to sig-

nificant costs associated with unpredictable and potentially excessive punitive damages awards. The direct costs of punitive damages to employers and insurers include increased costs in handling benefit claims, in paying out unmeritorious claims to avoid punitive awards, and in defending against suits which threaten wholly unpredictable results. *See* Kouri and Barrett, *Punitive Damages—Update*, Legal Section Proceedings of the American Council of Life Insurance 685, 696 (1979).[7] The decision of the court below invites frivolous litigation by disgruntled participants and beneficiaries seeking to recover substantial punitive and extra-contractual relief, as well as "strike suits" in which the plaintiff seeks a settlement motivated by the defendant's need to avoid the risk of unpredictable punitive damages, and the expense and time of its officers involved in a suit. *See Smith v. Wade*, 103 Sup. Ct. 1625, 1642 (1983) (dissenting opinion).

The imposition of punitive damages against plan fiduciaries would thus significantly increase the costs Congress carefully sought to minimize when it enacted ERISA. While the threat of punitive damages awards may deter breaches of fiduciary obligations, the detrimental impact of such awards on the continuing viability of employee benefit plans far offsets the benefits to be gained from deterrence. Because this case presents an important question of federal law, this Court should grant the Petition and clarify the critical statutory and policy issues presented.

[7] The indirect costs of exposing these employers and insurers to punitive and extra-contractual damages are also substantial. Such exposure would initiate a reversal of the trend witnessing the expansion of the number of benefit plans and the number of individuals covered by those plans. The proliferation of substantial and unpredictable punitive damages awards would discourage the future establishment of employee benefit plans. Moreover, exposure to punitive damages claims would deter employers from increasing their contributions to existing plans and thus the benefits available under those plans.

3. No Workable Standards for Assessing Punitive Damages Exist and Current Practices Provide No Basis for Consistency or Predictability in Punitive Damages Awards.

The criminal law concept of punishment as an adjunct to the civil law is not new. Roots in the common law for extending criminal law notions of punishment to the civil law may be found in a few cases in eighteenth century England, where juries awarded small amounts of damages unrelated to tangible losses in order to punish conduct resulting in affronts to the honor and dignity of victims.[8] The doctrine of punitive damages found its way to American law, and in 1851, was recognized by this Court in a modest way in *Day v. Woodworth*, 13 Howard 363 (1851).[9] Consistent with their English counterparts, the

[8] *See* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 12-20 (1982). Types of cases in which punitive awards were made included slander, trespass to land in certain cases, seduction, criminal conversation and false imprisonment.

[9] In *Day v. Woodworth*, the plaintiff brought an action for trespass *quare clausum fregit* after defendant and its agents removed a portion of the plaintiff's dam which was interfering with the proper functioning of the defendant's upstream dam. The case was tried to a jury, which awarded damages of $200. On a writ of error, this Court rejected plaintiff's argument that its recovery was not limited to actual damages, and affirmed the judgment of the lower court. Nevertheless, in a passage considered to be the foundation of punitive damages in American law, Justice Grier, writing for the Court, stated (13 Howard at 371):

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. . . . In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.

early American courts apparently confined the doctrine to tortious conduct, such as libel or slander, where actual damages for humiliation or an affront to dignity were essentially unascertainable. *See Day v. Woodworth*, 13 Howard at 371; Nelson, *Punishment for Profit: An Examination of the Punitive Damage Award in Strict Liability*, 18 Forum 377, 380-81 (1983).

In the 130 years following the *Day* decision, and particularly in the last decade, the doctrine of punitive damages has grown far beyond its origins in insult torts and has been stretched beyond the limits of its validity.[10] Punitive damages awards have become commonplace in insurance litigation[11] as well as in product liability

[10] As has been well said in another context, "these laws are being extrapolated to places where they no longer apply." Bernstein, "Dread Singularities" (Book Review), New York Times Book Review, April 25, 1982, p. 10.

[11] Juries have exhibited a tendency to award substantial sums as punitive damages in insurance cases. These awards present serious problems in the insurance industry, even though many of them have not fully survived judicial scrutiny. *See, e.g., San Jose Production Credit Association v. Old Republic Life Insurance Co.*, 723 F.2d 700 (9th Cir. 1984) (court reversed jury award of $500,000 in punitive damages for breach of implied covenant of good faith and fair dealing); *Dempsey v. Auto Owners Insurance Co.*, 717 F.2d 556 (11th Cir. 1983) (in action seeking recovery of fire loss under a policy, for bad faith refusal to pay, and for punitive damages, court held jury award of $3.1 million to be excessive and remanded with directions to require a remittitur to $1.5 million); *Sparks v. Republic National Life Ins. Co.*, 132 Ariz. 529, 647 P.2d 1127, *cert. denied*, 459 U.S. 1070 (1982) ($3 million award of punitive damages for insurer's tortious termination of insurance benefits upheld); *Egan v. Mutual of Omaha*, 24 Cal. 3d 809, 157 Cal. Rptr. 482, 598 P.2d 452 (1979), *appeal dismissed*, 445 U.S. 912 (1980) (jury award of $5 million in punitive damages against insurer for failure to conduct proper investigation of its insured's claim held to be excessive in that award was 40 times larger than the compensatory damages award and represented two and one-half months of the insurer's net income in 1973 as well as more than seven months of its income in 1974); *Neal v. Farmers Insurance Exchange*, 21 Cal.3d 910, 148 Cal. Rptr. 389 (Cal. 1978) (court upheld jury award of punitive damages, as reduced to $740,000 by

cases,[12] and prayers for punitive relief in mass tort

the trial court, for insurer's "bad faith" refusal to settle). Moreover, at the trial level in state courts, particularly those in California and Arizona, staggering sums have been awarded as punitive damages against insurers. Juries in California have awarded substantial punitive damages against insurance companies in amounts up to $8 million. *See Frazier v. Metropolitan Insurance Co.*, No. C233-971, L.A. Super. Ct. (March 14, 1983) ($8 million punitive award); *Garvey v. State Farm and Casualty Co.*, No. 760226, S.F. Super. Ct. (Feb. 18, 1982) ($1 million punitive award in "bad faith" case). Juries in the Arizona courts have exhibited a similar willingness to assess exorbitant punitive awards against insurers, as evidenced by a $2 million punitive award in *Linthicum v. Nationwide Life Ins. Co.*, No. 446562, Maricopa County (Dec. 15, 1982), a $3.5 million award in *Hawkins v. Allstate Insurance Company*, and a $10 million punitive award in *Trus Joist Corp. v. Safeco Insurance Co.*, No. C366678, Maricopa County (March 21, 1983).

[12] Prior to 1970, apparently only one reported appellate court decision had upheld an award of punitive damages in a products liability case. That decision, *Toole v. Richardson-Merrill, Inc.*, 251 Cal.App.2d 689, 60 Cal. Rptr. 398 (1967), involved a jury award of $250,000 for a drug company's failure to conduct proper tests and to provide adequate warnings on a cholesterol-inhibiting drug. Since the *Toole* decision, however, cases in which juries have awarded punitive damages in excess of $1 million have abounded. *See, e.g., Dorsey v. Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981) (court reinstated jury award for $5 million in punitive damages), *modified on other grounds*, 670 F.2d 21 (5th Cir.), *cert. denied*, 459 U.S. 880 (1982); *Airco Inc. v. Simmons First National Bank*, 276 Ark. 486, 638 S.W.2d 660 (Ark. 1982) (court affirmed jury award of $3 million in punitive damages); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn.), *cert. denied*, 449 U.S. 921 (1980) (jury award of $1 million in punitive damages upheld); *Leichtamer v. American Motors Corp.*, 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981) (award of $1.1 million in punitive damages upheld); *Maxey v. Freightliner Corporation*, 450 F. Supp. 955 (N.D. Tex. 1978) (jury award of $10 million in punitive damages overturned), *aff'd*, 623 F.2d 395 (5th Cir. 1980), *vacated and remanded upon rehearing*, 665 F.2d 1367 (5th Cir. 1982), *vacated in part and affirmed in part*, 722 F.2d 1238 (5th Cir. 1984); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38 (Alaska 1979), *cert. denied*, 454 U.S. 894 (1981) (court held jury award of $2,895,000 in punitive damages to be excessive); *Ford Motor Company v. Nowak*, 638 S.W.2d 582 (Tex. Ct. App. 1982) (court affirmed jury award of $4 million in punitive damages).

litigation are not uncommon.[13] Concurrent with the expansion of punitive damages beyond the traditional tort areas, the size and frequency of punitive damages awards have grown significantly.[14] In 1977, an informal survey by the American Council of Life Insurance revealed that nearly half of the 202 members in California who participated in the survey had extra-contractual or punitive damages actions pending against them, many with prayers exceeding $1 million. *See* Wilson, *Punitive Damages*, Legal Section Proceedings of the American Council of Life Insurance 13 (1977). Five years later, a member of the Council, having witnessed the proliferation of multi-million dollar punitive damages awards against insurers, stated:

> The imposing specter of extra-contractual damages pending over the life and health insurance industry developed in quantum proportions in the past year. What had been a threat became a reality. The sizable ad damna recited in many filed pleadings were translated into million-dollar payouts and multimillion dollar final awards.

Smith, *Annual Review of Litigation*, Legal Section Proceedings of the American Council of Life Insurance 349, 350 (1982).

Despite the phenomenal growth in the size and number of punitive damages awards, there has been no concurrent development of standards to guide courts and juries in assessing these awards. Examination of the cases shows that the standard of "maliciousness" has been lowered continuously over the past several years, and there is in fact little judicial control over it.[15] Even assuming that the requisite malicious or willful conduct exists to warrant an award of punitive damages, there are no standards to facilitate the determination of the appropriate measure of punitive damages. The broad discretion accorded to trial courts to award punitive damages significantly increases the risk that punitive damages awards will be arbitrary or excessive and altogether inappropriate based on the circumstances of the

[13] *See, e.g., Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506 (5th Cir. 1984) (court disallowed jury award of punitive damages, totaling $625,000, in a strict liability action initiated by a shipyard worker for injuries allegedly caused by exposure to asbestos products); *Palmer v. A.H. Robins Co.*, No. 81SA149 (Colo. June 4, 1984) (court upheld jury award of $6.2 million in punitive damages against the producer of a contraceptive device which was marketed despite the serious adverse effects associated with the product's use). *See* Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37 (1983).

[14] *See* notes 11, 12, and 13, *supra*. A report of the Ford Motor Company revealed that, prior to 1970, less than 0.5% of the products liability complaints filed against the company contained prayers for punitive damages. By 1980, punitive damages counts were appearing in over 27% of all such actions filed against Ford. *See* Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. of Chi. L. Rev. 1, 54 n.258 (1982). The impact of the increasing demands for punitive relief became clear in *Grimshaw v. Ford Motor Co.*, 119 Cal. App.3d 757, 174 Cal. Rptr. 348 (1981), where a jury awarded $125 million in punitive damages against Ford Motor Company after a car it had marketed with a fuel system found to be defective exploded as a result of a collision. The trial court remitted the award to $3.5 million, using standards no less indefinite than those used by the jury.

[15] The Supreme Court of Montana (in an opinion certifying Montana law to a Federal district court) recognized the uncertainty of standards in the area of punitive damages. *First Bank (N.A.)-Billings v. Transamerica Insurance Co.*, 670 P.2d 1217 (Mont. 1984). In holding that insurance coverage of punitive damages does not violate Montana's public policy, the court noted that "juries and judges typically award punitives for a broad range of conduct not often described as willful or wanton, but as merely reckless or unjustifiable." *Id.* at 1222. Refusing to preclude such insurance coverage in light of the uncertainty in the area of punitive damages, the court further stated that "fact-finders . . . wrestle with concepts like recklessness and reasonableness, such that defendants may not know that their conduct constituted presumed malice until after trial, and that a defendant in one case may never know the sting of punitive damages while another defendant in a similar case may be faced with financing a sizeable award." *Id.* at 1222.

case.[16] This unbridled discretion inevitably results in inconsistency and unpredictability—concepts foreign to our system of justice, and particularly hard to deal with in providing adequate premiums and reserves for an important type of insurance which is essentially funded by the accretion of small amounts based on recurrent wages.

The total lack of standards for awarding punitive damages in civil actions has prompted questions as to the constitutionality of the procedures for awarding these damages. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures,* 69 Va. L. Rev. 269 (1983). Because due process mandates fairness of procedures in civil cases, the absence of standards to determine the appropriate measure of punitive damages arguably conflicts with the Fifth and Fourteenth Amendments to the Constitution. Moreover, even though punitive damages actions are nominally civil, they exemplify characteristics which are inherently criminal. Unlike criminal actions, however, civil actions seeking punitive awards boast none of the constitutional protections accorded to criminal defendants, including indictment by a grand jury and proof beyond a reasonable doubt. *See*

[16] Members of this Court on several occasions have commented on the arbitrariness of punitive damages awards. *See, e.g., International Brotherhood of Electrical Workers v. Foust,* 442 U.S. 42, 50 (1979) ("Because juries are accorded broad discretion both as to the imposition and amount of punitive damages, . . . the impact of these windfall recoveries is unpredictable and potentially substantial"). *Cf. Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 (1971) (dissenting opinion of Justice Marshall). In *Gertz v. Robert Welch Inc.,* 418 U.S. 323, 350 (1974), Justice Powell wrote:

> In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.

See also the dissenting opinion of Justice O'Connor in *Smith v. Wade,* 103 Sup. Ct. at 1658-59, which seems especially applicable to this case.

Smith v. Wade, 103 Sup. Ct. 1625, 1641 (1983) (dissenting opinion). Further, the vagueness of standards precludes the provision of fair warning to potential defendants as to what conduct justifies punishment.

These constitutional infirmities inhere in the Ninth Circuit's decision in the instant case. As with the law of punitive damages in general, the Ninth Circuit's opinion establishes no workable standards for assessing punitive damages in ERISA actions. This absence of standards deprives fiduciaries under the Act of the procedural safeguards necessary to protect them from the vagaries of punitive damages law. This case thus affords this Court an opportunity to eliminate the expansion of this unfair and unworkable doctrine in the field of employee benefits—an area that directly affects millions of Americans in our nation's work force. By granting the Petition and sustaining the position of the Petitioners, this Court can establish a constitutionally sound and administratively feasible rule which would eliminate arbitrariness and unpredictability in ERISA civil enforcement actions to the great benefit of the great mass of the beneficiaries of these plans.

CONCLUSION

For the reasons set forth above and for the additional reasons advanced in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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